

To: New Jersey Law Revision Commission
From: Marna L. Brown
Re: New Jersey family (filial) responsibility/support statutes
Date: September 10, 2012

MEMORANDUM

It was recently brought to our attention by the Office of the Ombudsman for the Institutionalized Elderly, that a few state filial responsibility laws now are being used to force adult children to pay hospitals, nursing homes and long-term care facilities for the medical care of their indigent parents. Approximately 29 states, (including New Jersey), along with Puerto Rico, have family or filial responsibility/support statutes. Although we are advised that most of these laws are seldom enforced¹ -- in part, because federal law prevents states from considering the financial responsibility of any individual other than a spouse in determining the eligibility of an applicant or recipient of Medicaid or other poverty programs – that trend may be changing. As noted in one law review article, “[w]ith the pressure to cut public funding in the U.S., filial support laws have generated renewed interest on at least a theoretical or academic level.”²

The application of Pennsylvania’s law, in particular, has expanded in recent years and there is growing concern that New Jersey’s filial responsibility laws may be invoked in a similar manner.³ This memorandum examines these issues and a proposal for a new project.

Pennsylvania’s Filial Responsibility Law

Pennsylvania’s filial support provision dates to colonial times. However, the 2005 transfer of the provision from the welfare laws to the domestic relations code increased its visibility and its use. The statute provides that unless financially unable to do so, a spouse, parent and child all have the “responsibility to care for and maintain or financially assist an indigent person, *regardless of whether that person is a public charge.*” (Emphasis added.) Significantly, the Pennsylvania statute permits the filing of a petition by the indigent person “*or any other person. . . having any interest in the care, maintenance or assistance of such indigent person.*” (Emphasis added). See 23 Pa. C.S.A. §§4603 (a) and (c). According to at least one source⁴, nursing homes increasingly are turning to Pennsylvania’s filial support law as a tool to compel

¹ “Although twenty-eight states have enacted and retained filial responsibility laws, only a few states actively enforce the laws and eleven states have never enforced them.” The eleven states that have not enforced their filial responsibility statutes are Alaska, Delaware, Idaho, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Tennessee, Utah and Vermont. Allison E. Ross, *Taking Care of Our Caretakers: Using Filial Responsibility Laws to Support the Elderly Beyond the Government’s Assistance*, 16 Elder Law Journal 167, 174 (2008).

² See Prof. Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, The Pennsylvania State University, The Dickinson School of Law, June 8, 2012, p. 17 (approved for publication by Elder Law Journal at University of Illinois Law School, Fall 2012.)

³ Other states have applied the filial responsibility laws in disparate ways. While similar to Pennsylvania courts, the appellate courts in South Dakota have used that state’s filial support law to enforce liability against adult children for health care or long-term care expenses of a parent (see *Americana Healthcare Ctr. v. Randall*, 513 N.W. 2d 566 (S.D. 1994), the states of Idaho and New York have repealed their filial support laws.

⁴ Fleming & Curti, PLC, ‘*Filial Support*’ Laws: Making Children Pay for Their Parents’ Nursing Home.

adult children to help a parent qualify for Medicaid or to pay for the parent's bills out of their own pockets.

The gradual progression of this use of Pennsylvania's statute began in 1994, in *Savoy v. Savoy*, 641 A.2d 596 (Pa. Super. 1994)⁵ where a Pennsylvania court ordered an adult child to pay his mother's debts under the Pennsylvania filial responsibility law, finding that the mother was "indigent" for purposes of the law because her reasonable living expenses exceeded her monthly income. In *Presbyterian Medical Center v. Budd*, 832 A.2d 1066 (Pa. Super. 2003) a court ruled for the first time that the plaintiff -- a long term nursing facility -- was a "person . . . having an interest in the care, maintenance or assistance" of the parent, and thus the daughter could be held responsible, under the filial support law, for the costs to the nursing home of her deceased indigent mother's care. (Notably, the daughter had been accused of causing the mother to become indigent by transferring more than \$100,000 from her mother's accounts to her own.)

In 2005, after the Pennsylvania filial support law was transferred from the public welfare code to the domestic relations code, Pennsylvania nursing homes began, with greater frequency, to invoke the Pennsylvania filial responsibility laws in order to sue the relatives of residents who had not paid for their own care. The Pennsylvania Governor described the transfer of the law as "[updating] provisions requiring that immediate family members contribute to the cost of care, thus decreasing the burden on the Medical Assistance program, when possible."⁶

United opposition to this emerging pattern of enforcement practices led to members of the Pennsylvania Bar Association putting pressure on the state legislature to repeal the filial responsibility law. First blocked in the Senate, apparently due to pressure from the Pennsylvania Department of Public Welfare, a second bill seeking repeal was introduced in 2011 in the Pennsylvania House of Representatives. That bill is pending.

Most recently, in *Health Care & Retirement Corp. of America v. Pittas*, 2012 Pa. Super. 96 (May 7, 2012) ("Pittas"), under Pennsylvania's Section 4603, the court entered a judgment in the amount of \$92,943.41 against an adult son for long-term nursing home care rendered to his elderly mother. The lawsuit was commenced by the owner of the nursing home facility where Ms. Pittas had resided and where she had received long-term skilled nursing care and treatment for almost seven months (without paying the nursing home bill) before relocating to Greece. There was no evidence, as in *Budd*, that the adult child had in any way been responsible for the mother's indigency.

⁵ Earlier Pennsylvania cases held that an action in assumpsit may be used to enforce the duty imposed by the support law against a financially responsible relative. However, these cases invoked the support law under 62 P.S. §1973 (now repealed). See *Albert Einstein Medical Center v. Forman*, 212 Pa. Super. 450 (1968) (hospital successfully brings suit in assumpsit against son and two daughters for payment of indigent persons hospital bills) and *In re Stoner's Estate*, 56 A.2d 250 (1948) (assumpsit action based on affirmative duty of a child to support an indigent parent was held a valid action for reimbursement from a child for expenditures of a third party on behalf of an indigent parent).

⁶ See Prof. Katherine Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents* for an in-depth discussion of the Pennsylvania filial support law. Fn 138.

The possible affect of *Pittas* on New Jersey law is discussed in a July 25th *New Jersey Law Journal* article by William B. Isele, the 2012-13 Chairman of the NJSBA Elder and Disability Law Section and a former New Jersey Ombudsman for the Institutionalized Elderly.⁷ He describes *Pittas* as a case that has “aroused interest in” New Jersey’s “filial responsibility” law, N.J.S. 44:1-139, *et seq.* Although New Jersey’s statute differs significantly from Pennsylvania’s, this article is but one of many indicating a growing concern about the application of New Jersey’s law. This concern derives, in part, from the ambiguity and the anachronistic references in New Jersey’s current statute as will be discussed below.

New Jersey’s Filial Responsibility Law

New Jersey filial responsibility statutes primarily are set forth in two separate groups of sections. Sections 44:1-139, 44:1-140, 44:1-141 and 44:1-142 refer to municipal directors of welfare while virtually identical provisions that refer to county welfare boards and their directors appear in sections 44:4-100 through 44:4-103. A comparable provision, N.J.S. 44:7-19, permits recovery by the county director of welfare from relatives responsible by law for the support of applicants for old age and disability assistance. How often these laws are used in current practice is yet to be determined. For ease of comparison, only the Title 44, Chapter 4 provisions are set forth in detail in this memorandum, though all provisions are contemplated for revision.

N.J.S. 44:4-100 simply states that:

Upon application for the relief of a poor person the county welfare board shall ascertain if possible the relatives chargeable by law for his support and proceed to obtain their assistance or compel them to render such assistance as is provided by law.

Section 44:1-139 is identical, except that the “overseer” of the poor (now the municipal director of welfare) ascertains the chargeable relatives. Additional provisions in Chapters 1 and 4 of Title 44 set forth how the “assistance” of the “chargeable relatives” is obtained and – as necessary-- compelled. Section 44:4-101 states, in relevant part, that:

a. The father and mother of a person under 18 years of age who applies for and is eligible to receive public assistance, and the children, and husband or wife, severally and respectively, of a person who applies for and is eligible to receive public assistance, shall, if of sufficient ability, at his or their charge and expense, relieve and maintain the poor person or child in such manner as shall be ordered, after due notice and opportunity to be heard, by any county director of welfare, or by any court of competent jurisdiction upon its own initiative or the information of any person.

* * * * *

c. The provisions of this section shall not apply to any person 55 years of age or over except with regard to his or her spouse, or his or her natural or adopted child under the age of 18 years.

⁷ See *Can Adult Children Be Held Personally Financially Responsible for Supporting their Indigent Parents?*, by William P. Isele, in the July 30, 2012 issue of the *New Jersey Law Journal*, Special Section on Estate Planning and Elder Law. See also, e.g., *Filial Support Laws in the Modern Era: Domestic and international Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, Professor Katherine C. Pearson, The Pennsylvania State University, The Dickinson School of Law; *Note: Overcrowded Prisons and Filial Responsibility: Will States Utilize ‘Support of the Indigent’ Statutes to Solve the Baby Boomer and Prison Crises?*, Lynda Yamamoto, 41 Rutgers L.J. 435, Rutgers Law Journal, Fall/Winter 2009; and Matthew Pakula, *The Legal responsibility of Adult Children to Care for Indigent Parents*, National Center for Policy Analysis (July 12, 2005.)

Section 44:4-102 provides that:

If any of the relatives mentioned in section 44:4-101 of this Title shall fail to perform the order or directions of the county director of welfare with regard to the support of the poor person, or if the poor person is supported at public expense, the Superior Court, upon the complaint of the director of welfare or two residents of the county may summon the persons chargeable as in other actions and summon witnesses, and may order and adjudge the able relatives to pay such sum as the circumstances may require in the discretion of the court for each poor person, as will maintain and relieve him or them, and as will relieve the public of the burden of such care and maintenance. However, where it shall appear that the person or persons sought to be held were the child or children of the poor person and were abandoned and deserted by the poor person who failed to support and maintain them during minority, the Superior Court may revoke the order of the director of welfare or reduce the amount of said order against such child or children, in proportion to the actual support and maintenance rendered by said poor person to the child or children sought to be held. Any child now under an order to support a poor person may apply to the Superior Court which issued said order for the revocation or reduction of said order in accordance with the terms of this proviso. Violations of any such order of the Superior Court shall constitute a contempt of court.

The county through its governing body may also bring an appropriate action to recover any sum of money due for the relief, support and maintenance of any poor person against any person chargeable by law therefor.

The first New Jersey statute regarding aid to the poor -- passed in 1709 -- is derived from the English "Poor Relief Act" of 1601 and relies upon the basic premise that relatives should provide for the support of their poor and disabled relations. Unlike the Pennsylvania statute which does not define "indigent person" but expressly provides that the law apply "regardless of whether the indigent person is a public charge", under New Jersey law a "poor person" is clearly defined as a person "who is unable to maintain himself or those dependent upon him", and liability is imposed only with regard to a poor person "who applies for and is eligible to receive public assistance." See Sections 44:1-1 and 44:4-101(a). Our courts have consistently determined that not only must the person for whom support is sought be poor, he or she also must be unable to work. See *Hewitt v. Hollahan*, 56 N.J. Super. 372 (App. Div. 1959); *State v. Meeker*, 61 N.J.L. 146 (1897).

To whom the recovery is paid, however, is not as clear. Under Section 44:4-101 (a), responsible relatives may be ordered by any county or municipal director of welfare, or by an appropriate court, to pay for each poor person only after "due notice and opportunity to be heard". The court may make such an order upon its own initiative or upon *the information of any person*. (Emphasis added.)⁸ This latter provision was not part of the original law but added in the 1924 revision. No comparable section permitting a court to act on its own initiative or upon the information of any person appears in Section 44:7-19.

At the same time, under Section 44:4-102, if any relatives fail to perform the order or direction of the director of welfare, or if the poor person is supported at public expense, the Superior Court in the county, or the municipal court in the municipality, where the poor person

⁸ Notably, and consistent with other states, those children of the poor person who were abandoned and deserted by the poor person during the child's minority may be exempt from responsibility either by the court's revocation of an order of the director of welfare or by the court's reduction of the amount of the order against these children in proportion to the actual support and maintenance "rendered by said poor person to the child or children sought to be held." Sections 44:4-102 and 44:1-141.

has a legal settlement may, upon complaint, “adjudge that the able relatives pay such sum for each poor person as the circumstances may require. . . and as will maintain him or them and relieve the public of that burden”. The complaint may be brought either by (1) the director of welfare; or (2) two residents of the municipality or county where the poor person resides. (The settlement of the person is defined by section 44:1-1 as the person’s “right under the provisions of this chapter to relief or maintenance and support in a municipality, county or counties.”)⁹ Thus, a distinction is made between how the initial order is commenced and how it is then enforced.

In most of the court decisions that discuss who may sue for an order of support, the overseer of the poor or the director of welfare or welfare board is the plaintiff to whom recovery is paid. But in a very few cases, the courts permit the indigent person to bring the action for that person’s own benefit. Staff is of the view that the few cases that either recognize in the law, or assume, a private right of action may do so because of a misinterpretation of a 1924 revision of the pertinent law. But once again, this illustrates that the statute is just not clear on this point.

One of the earliest cases to discuss the “Poor Act” is *Ackerman v. Ackerman*, 55 N.J.L. 422 (1893). There the New Jersey Supreme Court -- referring to section 17 of the “Act for the settlement and relief of the poor”, passed on March 11th, 1774 (Paterson Laws, p. 31), and upon which the predecessor statutes to N.J.S. 44:4-100, *et seq.* and N.J.S. 44:1-139, *et seq.* derive -- stated that:

These provisions were not designed to establish any personal or private right to relief and maintenance form the relatives named therein, but were intended for the indemnity of the public against the maintenance of paupers.

The *Ackerman* court further concluded that although the law did not provide the manner in which the action shall be invoked, the court’s jurisdiction “most properly” is to be invoked by a complaint or petition of the overseer of the poor of the municipality “liable to support the pauper”. The court found, however, that it had jurisdiction to act under the statute if the application was commenced by the poor person so long as the application appeared to be “designed for the protection of the public.” The court stated that its jurisdiction did not depend upon the:

mode in which the facts essential to jurisdiction are presented. The court might decline to act if the application appeared not to be designed for the protection of the public. But if it acts upon a petition showing jurisdiction, its action will not be invalidated because the petition was presented by the pauper.

Subsequent legislative history continues to support this view. (Indeed, the law may in fact have been revised as a result of the *Ackerman* decision.) The 1924 revised Assembly Bill states that the purpose of the law is to

⁹ The municipal director of welfare of a municipality also may contract with relatives and others *not chargeable by law* who are able and willing to support and maintain the poor person. (Emphasis added.) See section 44:1-142.

revise the laws concerning the poor that within reasonable and proper limits due economy and better supervision of the situation may be obtained for the benefit of the State and its various subdivisions, with the hope that so far as possible the causes of dependency may be eliminated.

The Statement also says that the law

has features for relieving the public of the care of ‘natural dependents’ wherever there are relatives able to support them.

But subsequent court decisions differ on this issue. At least one court concluded that *Ackerman* was no longer good law. See *Montwid v. Montwid*, 11 N.J. Misc. 648, 649 (Sup. Ct. 1933) (“The contention of the prosecutor that under such cases as *Ackerman* [citation omitted], no personal right for support arises under the poor laws of the state, and that consequently the juvenile court was without authority to impose an order at the instance of the complaining witness in the cause, is decided to the contrary in *Glassman* [citation omitted].”) In *Glassman v. Essex County Juvenile Court*, 9 N.J. Misc. 519 (Sup. Ct. 1931), in response to a challenge to the determination of the Essex County Domestic Relations and Juvenile Court compelling Joseph Glassman’s three adult sons to contribute to the father’s support, the court stated that the 1924 statute (unlike the earlier version) “now allows complaint by the party seeking relief or the court itself on its own initiative.”

In *Gierkont v. Gierkont*, 46 N.J. Super. 112, 114, the Appellate Division cited to both *Glassman* and *Montwid* when rejecting a challenge to the court’s jurisdiction where an indigent father, relying upon N.J.S. 44:1-140, had commenced an action individually against his adult children. Mr. Gierkont had been receiving monthly public assistance from the Essex County Welfare Board at the time of the lawsuit and the issue was whether the court had jurisdiction under the statute. Although the court awarded payment to be made by the son, it appears that the award was not supplemental to what Mr. Gierkont had been receiving, but in lieu of public assistance he would otherwise have received.

In *Pavlick v. Teresinski*, 54 N.J. Super. 478 (Juv. and Dom. Rel. Crt. 1959), the court assumed a private right of action without any discussion of its legal basis, having determined that the mother could proceed in an action for support from her two adult sons even though she was not on public assistance. (Interestingly, a determination had been made that according to county welfare board standards, her minimum monthly needs would be \$82; she was then receiving a total monthly payment of \$40, voluntarily, from her sons.)

In addition, the reference to “two residents of the municipality or county” as an alternative to the director of welfare is anachronistic, causing further ambiguity. The original purpose of this provision was to ensure that the former overseer of the poor act in accordance with his or her legal obligations under the statutes. In *Stark v. Overseer of Poor of Jersey City*, 90 N.J.L. 187 (Ct. of Errors and Appeals 1917), the court stated that the “natural construction” of the statute is that the requirement of two residents provides for the situation where an “indigent relative is supported at public expense and the overseer neglects to make the order.” This interpretation is further supported by the legislative history.

The 1911 version of the statute expressly states that:

[s]hould such indigent relative be supported at public expense, and the *overseer neglect to make such order or direction, it shall be lawful for the Court of Common Pleas of the county wherein such indigent relative may have a settlement, upon complaint of the overseer or two freeholders resident in said municipality, to order, adjudge and decree* the able relatives above mentioned of any indigent person to pay such sum, not exceeding six dollars per week, for each indigent person, as will maintain and relieve such indigent person, and as will relieve the public from the burden of care and maintenance of such indigent person. (Emphasis added.)

Now that there are no longer “overseers of the poor” (members of local communities entrusted with carrying out responsibilities for coordinating local poor relief),¹⁰ but, in their place, directors of welfare (officials appointed by county welfare boards, approved by boards of chosen freeholders and whose appointment and tenure are subject to statute), there is no longer a need for this provision. This is especially true in light of the fact, as reported by this Commission in its 2009 final report on the Public Assistance Act, that county welfare agencies administer the majority of general assistance programs. The reference to “two residents of the municipality or county” should be eliminated from current law.

Conclusion

Staff believes that the expressed concern over the application of New Jersey’s law and its anachronistic language justifies a further look at possible revision of the statute. Staff seeks Commission approval to undertake this review and analysis, although further research and outreach to those who implement and benefit from the law will be necessary.

¹⁰ The Elizabethan Poor Law of 1601, upon which New Jersey modeled its original poor laws, created the office of Overseer of the Poor to be filled by “two to four ‘substantial Householdors’ of the parish, who were responsible for coordinating local poor relief by carrying out the provisions of the new law. By specifying substantial householders, the law was essentially asking the leaders of local communities to use their influence to determine the appropriate level of poor relief.” John A. Grigg, “*Ye relief of ye poor of sd towne*”: *Poverty and Localism in Eighteenth-Century New Jersey*, *New Jersey History*, 125:2, p. 25. This article gives a broad historical perspective on New Jersey poor laws.